

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
KAREN R. BAKER, JUDGE

DIVISION III

CACR06-00702

BILLY ALLRED

APRIL 11, 2007

APPELLANT

v.

APPEAL FROM THE SALINE COUNTY  
CIRCUIT COURT  
[CR2005-487-2]

STATE OF ARKANSAS

APPELLEE

HONORABLE GARY M. ARNOLD, JUDGE

AFFIRMED

A Saline County jury convicted appellant, Billy Allred, of second-degree murder. He was sentenced to 360 months in the Arkansas Department of Correction. He has two arguments on appeal. First, appellant argues that the trial court erred in denying his motion for a directed verdict. Second, he argues the trial court erred in denying his counsel the opportunity to cross examine the State's witness on a topic that the State introduced. Because we find that both of appellant's arguments are not preserved for appellate review, we affirm the trial court's decision.

On July 2, 2005, officers responded to a call reporting that shots had been fired at appellant's home. When they arrived, they found a Dodge Ram truck (belonging to appellant) and a Cadillac Deville (belonging to Jamarcco Hickman) in the driveway. The truck was parked in front of the car, and the car was smashed into the back bumper of the truck. The driver's door of the car was open. Inside, they found Hickman in the driver's seat, slumped over the steering wheel. He was bleeding; however, Officer Wylie testified that she was unsure of the source of the blood. Officer Russell testified that Hickman was experiencing labored breathing, and a large amount of blood was coming

from the left side of his neck. The officers found appellant standing in the middle of his front yard. Officer Russell testified that appellant approached him and said that Hickman was a “crack pusher” and that he had shot him.

Officer Wylie testified that when she arrived, appellant said to her, “I shot him, the gun’s in the house.” She placed appellant under arrest and placed him in her patrol car until paramedics arrived. Once detectives arrived, appellant was taken inside his home for an interview. During the interview, he told them that Hickman and Pamela Ewing had come to his house demanding money. Appellant said he and Hickman exchanged words at the front door. Appellant told them to leave and not to come back. Appellant followed the two of them out. As they got into the car, he and Hickman were still arguing. Hickman had started to back out of the driveway, and he then pulled forward, striking appellant’s truck. He told the detective that it was at that point that he shot Hickman.

Ewing, the other person in the vehicle, testified that she and appellant had previously dated and lived together. At the time of the incident, she still had personal belongings at appellant’s residence. She stated that on July 2, 2005, she needed a ride to go pick up some medication from the pharmacy and to pick up some money from appellant’s home, and Hickman offered to take her. She testified that when she and Hickman arrived at appellant’s home, they knocked on appellant’s door. Appellant answered the door and pointed a gun to her face. She and Hickman turned quickly to go back to the car. She testified that Hickman had started the car and had attempted to put it in reverse, when appellant came out to the car and shot Hickman in the head. Hickman “went limp and we hit the back of the truck.” “His foot slipped off and that’s when we went forward.” She ran from the vehicle and went next door to call 911.

Ewing explained that the reason Hickman had offered to give her a ride that day was because

she did not own a vehicle. She testified that she and Hickman were not romantically involved and that he was only doing her a favor. At that point in her testimony, the following dialogue took place:

DEFENSE COUNSEL: It wasn't unusual for you to have boyfriends while you and Mr. Allred were friends—

PROSECUTOR: Your Honor, I'm going to object to the relevance —

DEFENSE COUNSEL: She opened that door up. She was talking about him being jealous. I mean there's no reason for him to be jealous of this lady.

COURT: You can answer the question.

WITNESS: I had friends, but they were not boyfriends.

DEFENSE COUNSEL: If I had a police report where you and some black men had checked into the Capri Motel, would that be a lie?

WITNESS: Yeah, it would.

DEFENSE COUNSEL: It would? Do you want me to show you the police report?

PROSECUTOR: Your Honor, I'm going to object and ask that we approach.

DEFENSE COUNSEL: I'd be very happy to approach. I mean she opened the door about boyfriends and the black males. And I do have such a report.

PROSECUTOR: Well, be quiet. The jury is going to hear you.

COURT: What is it you would like to talk about?

PROSECUTOR: Your Honor, it's irrelevant. And he's trying to make an attack on her character with extrinsic evidence, and he can't do that under 60 — I think it's 609, the one I had open.

COURT: Well even though you did open the door with the jealousy, I don't know that that's, I mean that's just too far fetched. I'm going to sustain the objection, that deal at the Capri Motel is irrelevant.

DEFENSE COUNSEL: Well, it's just, you know —

COURT: And if it does have any probative value it's so far outweighed by the prejudicial effect that I don't think you should be able to do it.

Soon after the court sustained the prosecutor's objection, Detective Brown was called to testify. He testified that appellant told him that Hickman was a "drug pusher." When Detective Brown searched the Cadillac, he did not find any drugs. Dr. Frank Peretti of the State Crime Lab testified that he performed an autopsy on Hickman and that blood tests showed that there were no drugs in the blood; however, Diazepam, Valium, cocaine, amphetamines, and marijuana were found in his urine. The autopsy also showed that the wound was a "loose contact gunshot wound" that was fired at very close range. Dr. Peretti testified that in this case, the shot was fired only inches from Hickman's head.

At the close of the State's case, appellant made a motion for a directed verdict stating, "At this point in time, Your Honor, the Defendant would make a motion for directed verdict based upon the fact that proof is insufficient to support a verdict of guilty." The motion was denied.

Appellant was the last person to testify. He testified that he had a prior relationship with Ewing. On July 2, 2005, Ewing called him to see if she could borrow \$20. Appellant stated that he would not loan her the money because he "knew what she was doing with her money. She's a drug addict." He stated that Ewing and Hickman arrived at his house and were "pulling" on his storm door. He testified that he had a weapon because he was afraid; he thought they were trying to sell him drugs. They exchanged words, and appellant told them to leave. They returned to the car, backed out, and then pulled back in, hitting the rear bumper of his truck. Appellant testified that he then went outside and fired the gun at Hickman. He testified that he felt like he "was defending [his] life and [his] property."

At the close of appellant's testimony, appellant did not renew his motion for a directed verdict. The jury returned a verdict, finding him guilty of second-degree murder. This appeal followed.

Appellant's first argument on appeal is that the trial court erred in denying his motion for a directed verdict. Rule 33.1 of the Arkansas Rules of Criminal Procedure (2006) states:

(a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict *shall state the specific grounds therefor*.

(c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required by subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. *A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal.*

(Emphasis added). At the close of the State's case, defense counsel made a general motion for a directed verdict, stating that "At this point in time, Your Honor, the Defendant would make a motion for directed verdict based upon the fact that proof is insufficient to support a verdict of guilty." The court denied the motion. At the close of all of the evidence, defense counsel did not renew the motion for a directed verdict.

Rule 33.1(a) provides that a motion for a directed verdict must state the specific grounds upon which the motion is based and further provides that the failure of a defendant to challenge the sufficiency of the evidence at the times *and in the manner* required by the rule will constitute a waiver of any question pertaining to sufficiency of the evidence. *See* Ark. R. Crim. P. 33.1(c) (emphasis added). Appellant's motion was inadequate, in that "[a] motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense." Ark. R. Crim. P. 33.1(c); *Smith v. State*, 367 Ark. 274, \_\_\_ S.W.3d \_\_\_ (2006). The motion must specifically advise the trial court as to how the

evidence was deficient. *Id.* (citing *Nelson v. State*, 365 Ark. 314, \_\_\_ S.W.3d \_\_\_ (2006); *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000)). The reason underlying this requirement that specific grounds be stated and that the absent proof be pinpointed is that it allows the circuit court the option of either granting the motion, or, if justice requires, allowing the State to reopen its case to supply the missing proof. *Id.* (citing *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997)). This court will not address the merits of an appellant's insufficiency argument where the directed-verdict motion is not specific. *See Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003). Here, appellant's directed-verdict motion was a general objection that did not apprise the court of the specific basis on which the motion was made and was, thus, insufficient to preserve the argument on appeal. Moreover, in failing to renew his motion at the close of all the evidence, as required by Arkansas Rules of Criminal Procedure, Rule 33.1(a), appellant did not preserve his argument for appeal. As a result, we will not address the merits of his argument as to the sufficiency of the evidence.

Second, appellant argues that the trial court erred in denying his counsel the opportunity to cross examine the State's witness on a topic that the State introduced. On appeal, appellant frames his argument as a constitutional violation, where the trial court denied his constitutional right to confront and cross-examine witnesses. The State argues that appellant failed to raise this constitutional argument below. Specifically, appellant did not offer any response that raised constitutional issues to the State's objection, and he did not argue that the court had improperly infringed upon his right to cross-examine the witness by virtue of its evidentiary ruling. Moreover, the State argues that appellant failed to proffer the evidence that he claimed the trial court improperly excluded. We agree. Appellant did not make a constitutional argument below. Even a constitutional argument, such as a Confrontation Clause argument, is waived if it is not presented to the trial court. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), *cert. denied*, 520 U.S. 1244

(1997). The Confrontation Clause was not raised at trial, and as such, his argument is now barred from review. Moreover, appellant failed to proffer the evidence that the trial court excluded. Where evidence is excluded the party challenging that decision must make a proffer of the excluded evidence at trial so that this court can review the decision. *See Brown v. State*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Jan. 4, 2007). Without the proffer, appellant has failed to preserve his argument regarding the evidence he sought to admit. *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003). Because appellant failed to preserve either of his arguments for our review, we affirm.

Affirmed.

HART and GRIFFEN, JJ., agree.